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Supreme Court, U.S.
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NO. 05-1607

IN THE
Supreme Court of the United States

U.S. BANK NATIONAL ASSOCIATION,
Petitioner,

v.

KATHY KROSKE,
Respondent.

On Petition for a Writ of Certiorari to the United States Court of Appeals for the Ninth Circuit

RESPONDENT'S BRIEF IN OPPOSITION

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QUESTION PRESENTED

Whether the National Bank Act—which allows national banks to dismiss bank officers "at pleasure" and which petitioner concedes does not preclude claims brought under the federal Age Discrimination in Employment Act (ADEA)—preempts an age discrimination claim brought under a Washington State statute that substantively mirrors the ADEA.

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STATEMENT OF THE CASE

Congress enacted the National Bank Act in 1864. To preserve public trust in the highest ranking officials of national banks, Congress included in the Act a provision that allows the banks to dismiss its officers "at pleasure." *See* 12 U.S.C. § 24 (Fifth). The parties agree that the Act does not authorize national banks to dismiss its officers in violation of the federal Age Discrimination in Employment Act of 1967 (ADEA), 29 U.S.C. § 621 *et seq*. The issue in this case is whether the National Bank Act authorizes national banks to violate state anti-discrimination laws that substantively mirror the ADEA and are an integral part of the enforcement mechanisms created by the ADEA.

Respondent Kathy Kroske worked for petitioner U.S. Bank National Association for 25 years. Pet. App. 3a. She began as a teller in 1977 and was later promoted to retail market manager. The year before her termination, the bank restructured, and, as a result, Ms. Kroske's job title was changed to branch manager. *Id.*; Def's Statement of Material Facts ¶ 8. At age 51, Ms. Kroske was significantly older than any of the other branch managers in her market area, all of whom were in their twenties or thirties. Compl. ¶ 3.5; Pet. App. 4a.

Shortly after becoming branch manager, Ms. Kroske's supervisor notified her that she was not meeting the goals he had set for her branch. He threatened her with probation or termination if she did not meet her goal by week six of her next campaign to increase business. Compl. ¶ 3.10. Even though Ms. Kroske's branch was short-staffed, the supervisor increased its goal by 62% over the previous campaign while drastically decreasing the goals for the other branches in the market area. *Id.* ¶ 3.13. During the campaign, two key employees left the branch, and despite numerous requests to her supervisor for assistance, none was provided. Moreover, the departed employees were not quickly replaced, and the bank's goal was

not reduced. *Id.* ¶¶ 3.14-3.17. Even so, Ms. Kroske's branch had achieved 91% of its goal by the week-six deadline. *Id.* ¶ 3.18. By the campaign's end, Ms. Kroske's branch had exceeded by nearly 20% the goal imposed by the bank. *Id.* Nevertheless, Ms. Kroske was fired. Pet. App. 3a-4a. She was replaced by a man in his twenties with less experience. *Id.* at 4a; Compl. ¶ 3.19.

Ms. Kroske brought this action in Washington State Superior Court. She alleged that the bank terminated her because of her age in violation of the Washington Law Against Discrimination (WLAD). She sought damages, attorney's fees, and costs. The Bank removed the case to federal court and moved for summary judgment, arguing that 12 U.S.C. § 24 (Fifth)—the National Bank Act's dismiss-at-pleasure provision—preempts Ms. Kroske's claim under the WLAD. The district court granted the motion. Pet. App. 60a.

The Ninth Circuit reversed and remanded the case to the district court for further proceedings. Pet. App. 2a. The court concluded that the at-pleasure provision, as impliedly amended by the ADEA, does not preempt the WLAD. In so holding, it relied, among other things, on the fact that, under the ADEA, state anti-discrimination statutes "pla[y] an integral role in the enforcement of the federal anti-discrimination scheme" and that the WLAD "substantively mirrors" the ADEA. *Id.* at 23a, 24a. Thus, the court concluded, absent any explicit or implicit congressional intent to the contrary, the at-pleasure provision of the National Bank Act does not preempt an anti-discrimination statute enacted under Washington State's historic police powers. Pet. App. 22a-25a.

REASONS FOR DENYING THE WRIT

A. No Conflict Exists Among The Federal Courts Of Appeals Or With A Decision Of The California Supreme Court.

Petitioner premises its claim for certiorari on supposed conflicts with the Sixth Circuit and the California Supreme Court. Pet. i, 2-3, 10-14. Both conflicts are illusory. Accordingly, review should be denied.

1. There Is No Meaningful Split With The Sixth Circuit.

In a 1987 per curiam decision, the Sixth Circuit held that the at-pleasure provision of the Federal Reserve Act—*not* the National Bank Act at issue here—preempts a state-law statutory anti-discrimination claim. *See Ana Leon T. v. Federal Reserve Bank of Chicago,* 823 F.2d 928 (6th Cir. 1987), *cert. denied,* 484 U.S. 1086 (1987). *Leon* does not support review in this case for three independent reasons.

a. Even assuming that a claim of preemption by the Federal Reserve Act is identical to a claim of preemption by the National Bank Act, *but see infra* at 7-10, in the many decades since state legislatures began enacting employment discrimination legislation, only two federal courts of appeals—the Sixth Circuit in its 1987 *Leon* decision and the Ninth Circuit in the decision below—have addressed the question whether a federal at-pleasure provision preempts a state-law statutory employment discrimination claim. Thus, at most, the petition presents a shallow circuit split that cries out for further percolation before this Court enters the fray.

The need for additional consideration by the lower appellate courts is underscored by the Sixth Circuit's failure in *Leon* to provide any explanation or analysis. The court focused almost entirely on the plaintiff's federal employment discrimination

and civil rights claims, 823 F.2d at 929-32, and, in one sentence, concluded without discussion that the Federal Reserve Act's at-pleasure provision "preempts any state-created employment right to the contrary." *Id.* at 931. Although the court explicitly recognized that federal employment discrimination claims are not affected by the at-pleasure provision, *see id.*, it did not confront the question whether state-law employment discrimination claims that substantively mimic federal employment discrimination claims should be treated differently from state-law claims that seek to impose liability beyond that provided by federal law.

Even petitioner recognizes that a discussion of the merits requires far more analysis than that provided by *Leon*. *See* Pet. 4-5, 15-17, 23-25. And, not surprisingly, other courts, including the court of appeals below, have commented on the Sixth Circuit's cavalier treatment of the preemption issue. *See* Pet. App. 17a (noting that the Sixth Circuit provided "little analysis" and rejecting its "summary conclusion"); *Katsiavelos v. Federal Reserve Bank of Chicago*, 1995 WL 103308, *2 (N.D. Ill. Mar. 3, 1995) (criticizing "[t]he *Leon* court [for] provid[ing] no reasons or policy for its holding"); *Moodie v. Federal Reserve Bank of New York*, 831 F. Supp. 333, 336 (S.D.N.Y. 1993) (refusing to follow *Leon* because "the Sixth Circuit's pronouncement gives no basis for its opinion and sets forth no policy reasons for its holding"); *White v. Federal Reserve Bank*, 660 N.E.2d 493, 495 (Ohio Ct. App. 1995) ("[T]he Sixth Circuit... failed to engage in any analysis or state the basis of its decision. Therefore, we decline to rely upon the holding in *Ana Leon T.*").

Given *Leon*'s extremely cursory consideration of the preemptive scope of the Federal Reserve Act's at-pleasure provision, its holding is ideally suited for en banc review in the

Sixth Circuit, not for review by this Court.[1]

b. Although *Leon*'s conclusory holding is stated very broadly, *Leon* may not, in fact, be at odds with the ruling below. The plaintiff in *Leon* originally filed an administrative charge with the Equal Employment Opportunity Commission (EEOC), claiming discrimination on the basis of national origin and disability. 823 F.2d at 929. Her *pro se* district court complaint "did not explicitly set forth the legal bases of her claims," but asserted only "that she was discharged on false grounds of chronic tardiness and that she was discriminated against." *Id.* On appeal, still proceeding *pro se*, the plaintiff claimed discrimination on the basis of national origin and race under both federal anti-discrimination law and Michigan's Elliott-Larsen Act, which prohibits an employer from discriminating on some, but not all, grounds prohibited by federal law and some grounds not covered by federal law, such as "weight, height, or marital status." *Id.* at 931. As a matter of federal law, the Sixth Circuit held that only the plaintiff's national origin claim was potentially viable and remanded for further fact finding to determine whether the claim had been timely filed. *Id.* at 931-32.

As for the plaintiff's state-law claim, the Sixth Circuit noted that the Elliott-Larsen Act does not prohibit national

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[1]In *Arrow v. Federal Reserve Bank of St. Louis*, 358 F.3d 392 (6th Cir. 2004), issued some 17 years after *Leon*, the Sixth Circuit was again presented with the question whether the Federal Reserve Act preempts a state anti-discrimination claim, and, again, it did not analyze the issue on its merits. Rather, the court noted that oral argument was not warranted and affirmed the district court's dismissal on the ground that it was bound by *Leon*. *See id.* at 393 (citing Sixth Circuit Rule 206(c) requiring adherence to panel rulings, absent en banc review, and noting that "[t]here being no principled basis on which to distinguish *Leon*, we are obliged to follow its holding."). The plaintiff in *Arrow* did not seek en banc review.

origin discrimination and that the plaintiff's race discrimination claim had been forfeited for failure to raise it below. *Id.* at 931. Beyond that, *Leon* provided *no* description of the plaintiff's state-law claim. However, it appears that the only state-law claim that the plaintiff could have possessed was one based on disability discrimination, because she had made some mention of discrimination on the basis of lower back pain in her EEOC charge. Such a state-law discrimination claim necessarily would have gone beyond the protections of federal law, which did not provide a general right of action for disability discrimination until the private employment provisions of Title I of the Americans With Disabilities Act became effective in 1992. *See* Pub. L. 101-336, § 108, 104 Stat. 337 (1990); *see also* 50 Fed. Reg. 18,769 (May 2, 1985) (federal reserve banks are private employers for purposes of federal anti-discrimination legislation). In sum, it is likely that the state-law discrimination claim in *Leon*, to the extent that it can be discerned from the Sixth Circuit's ruling, was *not* the kind of claim cognizable under federal law.

By contrast, the Washington Law Against Discrimination (WLAD), under which Ms. Kroske's claim arises, is substantively the same as the federal Age Discrimination in Employment Act (ADEA). In relevant part, the "WLAD provides that it is an unfair practice for any employer '[t]o discharge or bar any person from employment because of age.' Wash. Rev. Code § 49.60.180(2). This provision mirrors the substantive provisions of the ADEA and is interpreted consistently with the ADEA." Pet. App. 20a-21a; *see Anderson v. Pacific Maritime Ass'n*, 336 F.3d 924, 926 n.1 (9th Cir. 2003) ("Washington's Law Against Discrimination tracks federal law, and thus our analysis will cite only federal law, but applies with equal force to the Plaintiffs' claim under Washington law."). The Ninth Circuit's no-preemption ruling

below rested on the WLAD's substantive identity with federal law and suggested that a case presenting a more expansive state-law claim would have presented a different, and potentially more difficult, question:

> We therefore recognize that state law prohibitions against discriminatory termination that are not consistent with federal anti-discrimination laws may frustrate the congressional purpose of uniform regulation reflected in the National Bank Act. Nonetheless, the fact that some state law provisions prohibit termination on grounds that are more expansive than the grounds set forth in federal law does not undermine our conclusion that Kroske's age discrimination claim under the WLAD, which substantively mirrors a claim under the ADEA, is not preempted.

Pet. App. 24a.

In this regard, the decision below is not inconsistent with the result reached in *Leon*. The Sixth Circuit held that the at-pleasure provision of the Federal Reserve Act preempted a state employment discrimination statute that was likely being employed in a manner substantively inconsistent with federal anti-discrimination law. Given the complete failure of analysis in *Leon*, the Sixth Circuit probably gave no thought to the question whether state anti-discrimination laws that mirror federal law are preempted by the Federal Reserve Act. Given that reality, the Sixth Circuit will likely revisit *Leon* in an appropriate case.

c. The foregoing discussion has assumed, as have some courts, *see, e.g.*, *Arrow*, 358 F.3d at 394; Pet. App. 12a n.2, that the preemptive breadth of the at-pleasure provision of the Federal Reserve Act at issue in *Leon* is the same as that of the at-pleasure provision of the National Bank Act at issue here.

Although in our view neither act preempts state-law anti-discrimination claims, there is a serious argument that the National Bank Act's at-pleasure provision has less preemptive force than that of the Federal Reserve Act. Thus, a decision regarding the preemptive effect of one Act cannot properly be viewed as in conflict with a decision regarding the preemptive effect of the other.

The National Bank Act was enacted in the 1860's. "To interpret accurately" Congress's intent, the Court must not read statutes "as if they were written today, for to do so would inevitably distort their intended meaning." *Goldstein v. California*, 412 U.S. 546, 564 (1973). As the court of appeals below noted, one commentator has recently argued "that in light of the employment law principles that were in force at the time of the enactment of the National Bank Act, the courts have erred in concluding that the at-pleasure provisions were intended to render state contractual claims void." Pet. App. 14a n.3. Although "[w]e are accustomed to thinking of employment law in the United States as basically a regime of employment at will[,] ... this was not the back-drop against which the 'at pleasure' language was drafted and enacted in New York in 1838, or re-enacted in the National Currency and National Bank Acts of 1863 and 1864." M.B.W. Sinclair, *Employment at Pleasure: An Idea Whose Time Has Passed*, 2 U. Tol. L.Rev. 531, 540 (1992).

In fact, according to this scholar, the reality was "precisely the contrary." *Id.* "[E]mployment for an unspecified term was presumed to be annual, and dismissal within that term had to be for cause." *Id.* at 541. On the other hand, another scholar argues that, by the mid-nineteenth century, "whatever consensus [had] existed" regarding the presumptive one-year term had "dissolved." Jay Feinman, *The Development of the Employment at Will Rule*, 20 Am. J. Legal Hist. 118, 122-23 (1976) (citing

one mid-nineteenth century treatise stating that no presumption of yearly hiring existed in Connecticut, a mid-century New York Court of Appeals decision holding that the English rule of annual hiring still governed in New York, and another mid-century treatise arguing for a rebuttable presumption of yearly hiring).

The National Bank Act was passed in the midst of this confusion. Thus, seen from the perspective of a mid-nineteenth century legislator, the term "at pleasure" served only to override any common-law understanding of one-year employment and to institute what today is known as employment "at-will," not to negate statutory protections that alter employment contracts by imposing anti-discrimination obligations.

By 1913—when the Federal Reserve Act at issue in *Leon* was enacted—the background understanding had changed and employment at-will was the norm. *See* J. Peter Shapiro and James F. Tune, *Implied Contract Rights to Job Security,* 26 Stan. L. Rev. 335, 341 (1974) ("With us the rule is inflexible, that a general or indefinite hiring is *prima facie* a hiring at will.") (quoting Horace Wood, *Master and Servant* § 134 (1877)); 11 A.L.R. 469 (1921). Therefore, the Federal Reserve Act's at-pleasure provision arguably was intended to do more than clarify that Federal Reserve employees may be dismissed without cause. In our view, neither at-pleasure provision preempts any claim under a state statutory employment discrimination statute because neither was intended to accomplish that end. *See infra* Part C. However, because the preemptive scope of the at-pleasure provision of the National Bank Act may be based on different considerations than those applicable to the preemptive scope of the at-pleasure provision of the Federal Reserve Act, *Leon* and the ruling below do not present the same legal issue. The Court should await a genuine conflict in appellate authority regarding the same Act of

Congress before it grants review.[2]

2. The Alleged Conflict With The California Supreme Court Does Not Exist.

The petition also relies on an asserted conflict with a case from the California Supreme Court, *Peatros v. Bank of America*, 990 P.2d 539 (Cal. 2000). No such conflict exists. To explain why, it is necessary to describe the three opinions of the seven justices in *Peatros*.

First, as petitioner acknowledges, the three-justice lead opinion, authored by Justice Mosk, held that the National Bank Act does *not* preempt claims under state anti-discrimination statutes with substantive obligations no greater than those demanded under federal anti-discrimination law. For that reason, the Mosk opinion held that plaintiff Peatros's state-law claim could go forward.

Writing only for herself, Justice Kennard found that the plaintiff was not a bank "officer" and, thus, was not covered by the at-pleasure provision. Like the Mosk opinion, therefore, Justice Kennard's opinion concluded that the plaintiff's state-law suit could proceed. *Id.* at 557. Thus, the *decision* of the California Supreme Court was that the plaintiff could sue the national bank under state anti-discrimination law. To be sure, in dictum, Justice Kennard stated her view that, if the plaintiff

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[2]Cases involving the issue whether an at-pleasure provision preempts state common-law wrongful discharge claims, such as *Andrews v. Federal Home Loan Bank of Atlanta*, 998 F.2d 214 (4th Cir. 1993), cited in the petition (at 14), are inapposite, because they do not involve state-law statutory employment discrimination claims with analogues in federal employment discrimination law. The petition tacitly concedes this point by limiting the question presented to whether Ms. Kroske's "state employment discrimination law" claim is preempted in light of Congress's enactment "of a federal employment discrimination law." Pet. i.

had been an officer, the National Bank Act's at-pleasure provision would have preempted the California anti-discrimination claim. But that aspect of Justice Kennard's opinion was entirely unnecessary to her conclusion that the plaintiff's claim could proceed. *Id.* at 559.

In a dissent joined by two other justices, Justice Brown stated that the National Bank Act barred Ms. Peatros from suing the bank on *any* state-law discrimination claim, regardless of its scope. *Id.* at 559 (Brown, J., dissenting). Justice Brown's view appears to have been animated, in part, by her belief that even *federal* statutory anti-discrimination claims may be precluded by the National Bank Act, a view that no court has ever embraced and that petitioner here rejects. *See id.* at 560-61 (Brown, J., dissenting).

By cobbling together Justice Kennard's dictum and the Brown dissent, for a supposed 4-to-3 pro-preemption precedent, petitioner claims a conflict that will purportedly create disarray among the state and federal courts in California. To justify its position, petitioner cites a 1914 decision, *Del Mar Water, Light & Power Co. v. Eshleman*, 140 P. 948, 948 (Cal. 1914), for the broad notion that "a legal proposition supported by four or more justices of the California Supreme Court is recognized as the holding of that court." Pet. 10 n.1. *Del Mar* does not remotely stand for that proposition. Rather, it stands for the unremarkable view that if a proposition does not garner the views of four justices, it cannot serve as the opinion of the Court for the purpose of according relief to the parties. *See Del Mar*, 140 P. at 948 ("[I]n the decision of a case before the court in bank the concurrence of at least four justices is necessary, and that any proposition or principle stated in an opinion is not to be taken as the opinion of the court, unless it is agreed to by at least four of the justices."). *Del Mar* does not suggest, let alone require, that every view expressed by four justices *must*

be considered *a controlling precedent* of the California Supreme Court. More importantly, *Del Mar* does not even intimate that a three-justice dissent, together with a dictum from a justice who joined the lead opinion, should, let alone must, be considered controlling precedent. The very most that can be said from petitioner's perspective is that the opinions in *Peatros* establish no law on the question presented.

But there is no need to parse a 1914 decision to ascertain *Peatros*'s value as precedent because we know how *Peatros* has actually been viewed in the California courts. A raft of precedential rulings have treated the Mosk opinion (rather than the Kennard dictum and/or the Brown dissent) as the precedent of the court. The California Supreme Court itself has cited the Mosk opinion in two majority rulings, but has never cited either the Kennard or Brown opinion. First, in *Nordyke v. King*, 44 P.3d 133, 138 (Cal. 2002), in a ruling joined by Justice Kennard, the court called the Mosk opinion the "lead opinion" and described it as holding that the "National Banking Act preempts the state Fair Employment and Housing Act to the extent that the two conflict, but does not to the extent that they do not." Second, in the unanimous decision in *Jevne v. Superior Court*, 111 P.3d 954, 971 (Cal. 2005), Justice Kennard herself invoked the Mosk opinion for the proposition that preemption occurs to the extent of conflict between federal and state law, but no further.

Similarly, precedential opinions of the California Courts of Appeal have repeatedly treated the Mosk opinion (and not the Kennard dictum and/or the Brown dissent) as the opinion of the court on matters of preemption jurisprudence.[3]

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[3]*See City of Rancho Palos Verdes v. Abrams*, 124 Cal. Rptr. 2d 80, 86 (Cal. Ct. App. 2002); *Gentry v. eBay*, Inc., 121 Cal. Rptr. 2d 703, 715 n.8 (continued...)

On the other hand, the best that petitioner can muster is a lonely unpublished decision of the California Court of Appeal, *Pereira v. Bank of America*, 2002 WL 221984 (Cal. Ct. App. Feb 13, 2002). Petitioner's use of *Pereira* is puzzling. First of all, because *Pereira* is unpublished, it is not authority, binding or otherwise, anywhere in California, and it may not be cited as precedent under California Rule of Court 977(a). *See Pereira*, 2002 WL 221984. Thus, there is virtually no chance that *Pereira* will help transform Justice Brown's dissent into a controlling precedent.[4]

Moreover, petitioner cites *Pereira* as evidence that "the [California] Courts of Appeal"—stated in the plural—are treating the Brown dissent and/or the Kennard dictum as the ruling of the court in *Peatros*. *See* Pet. 10 n.1. That is simply not so. The unpublished decision in *Pereira* is the *only* opinion even suggesting that reading of *Peatros*.

In sum, in the face of numerous California Supreme Court and Court of Appeal rulings treating the Mosk opinion as authoritative, petitioner has manufactured a conflict where none exists.

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[3](...continued)
(Cal. Ct. App. 2002); *Gibson v. World Sav. & Loan Ass'n*, 128 Cal. Rptr. 2d 19, 23 (Cal. Ct. App. 2002); *Kanter v. Warner-Lambert Co.*, 122 Cal. Rptr. 2d 72, 86 (Cal. Ct. App. 2002); *Black v. Financial Freedom Senior Funding Corp.*, 112 Cal. Rptr. 2d 445, 452 (Cal. Ct. App. 2001); *see also Monarch Healthcare v. Superior Court*, 93 Cal.Rptr.2d 619, 624 (Cal. Ct. App. 2000) (citing Mosk opinion for principle of statutory interpretation).

[4]Even among unpublished decisions, *Pereira* is an outlier. For example, in *Drolla v. ChevronTexaco Corp.*, 2004 WL 2750328, at *6 n.11 (Cal. Ct. App. Dec. 2, 2004), the court explicitly treated the Mosk opinion's views on preemption as a holding of the California Supreme Court. *See also Armed Forces Ins. v. United Services Auto. Ass'n*, 2005 WL 2436656, at *2 (Cal. Ct. App. Oct. 3, 2005); *Varr v. Olimpia*, 2002 WL 1425373, at *12 (Cal. Ct. App. July 1, 2002).

B. The Lack Of Finality Of The Ninth Circuit's Ruling Underscores The Conclusion That Review Should Be Denied.

Petitioner ignores another compelling reason to deny review: the interlocutory nature of the ruling below. Although this Court has jurisdiction to review interlocutory decisions of federal courts of appeals under 28 U.S.C. § 1254(1), it seldom does so, and this case is not the rare case in which interlocutory review is appropriate. "Ordinarily, in the certiorari context, 'this court should not issue a writ of certiorari to review a decree of the circuit court of appeals on appeal from an interlocutory order, unless it is necessary to prevent extraordinary inconvenience and embarrassment in the conduct of the cause.'" Robert L. Stern, et al., *Supreme Court Practice* § 4.18, at 258 (8th ed. 2002) (quoting *American Constr. Co. v. Jacksonville, T. & K.W. Ry. Co.*, 148 U.S. 372, 384 (1893) (emphasis added)); *see also, e.g., Hamilton-Brown Shoe Co. v. Wolf Bros. Co.*, 240 U.S. 251, 258 (1916) (interlocutory decisions are reviewed only "in extraordinary cases").

The posture of this case is anything but extraordinary. Ms. Kroske filed a garden-variety state-law age discrimination claim in state court. Assuming the facts alleged by Ms. Kroske to be true, the district court granted summary judgment to the defendant bank on the purely legal ground that the National Bank Act preempts her WLAD claim. The Ninth Circuit reversed and held that the district court erred in its preemption ruling, sending Ms. Kroske's claim back to the district court for further proceedings. On remand, the bank will retain all other legal defenses it may have, and the trier of fact will be free to decide in favor of the bank on any lawful ground. If the bank prevails on the merits of the age discrimination issue or on any other dispositive ground, review on the question presented in the petition would not be necessary (or appropriate).

This case is a less appropriate vehicle for immediate,

interlocutory review than was true in *Virginia Military Inst. v. United States*, 508 U.S. 946 (1993) (*VMI*). There, the Fourth Circuit had issued a final decision holding that the Commonwealth of Virginia's sponsorship of a military college for men only was unconstitutional, but the district court had yet to rule on the appropriate remedy. The Court denied certiorari on the ground that the decision was not sufficiently final because the remedy phase had not been completed. *See id.* at 946 (Scalia, J., concurring). The Court recognized that there would be time enough to review the decision if that were necessary after the remedial portion of the case had concluded, *id.*, and, in fact, it later did so. *See United States v. Virginia*, 518 U.S. 515 (1996). Here, there is no decision regarding liability, let alone the appropriate remedy.

Of course, Ms. Kroske believes that she will prevail on the merits. If she does, the bank may appeal from the final decision and, ultimately, petition the Court on the preemption question (and any other federal issue). *See VMI*, 508 U.S. 946 (Scalia, J., concurring). Moreover, unlike the *VMI* case, which was sui generis, here, if petitioner is correct that the appellate courts will, someday, become seriously conflicted, the question presented will arise frequently, and there will be any number of appropriate future vehicles that would allow this Court to resolve it. In the meantime, the Court should stay its hand and allow Ms. Kroske's case to run its course.

C. The Merits Of The Court Of Appeals' Ruling Provides No Basis For Review.

Because Ms. Kroske's case presents no conflict in appellate authority and lacks finality, there is no compelling reason to delve into the merits of the decision below. The petition's faulty analysis of the merits, however, demands a rejoinder.

1. As explained above (at 7-10), when read in the context of its enactment in the mid-1860's, the National Bank Act's at-pleasure provision is most sensibly seen as clarifying that,

absent contrary positive law, a national bank officer who lacks contractual protection for a specified term may be dismissed without cause. Thus, just as 12 U.S.C. § 24 (Fifth) does not override the ADEA—which injects a federal non-discrimination obligation into every employment contract, whether or not at-will—it does not override state age discrimination laws, such as the WLAD, which do the same as a matter of state law.

That the National Bank Act's at-pleasure provision applies only to the *dismissal* of bank officers underscores that it does not extend beyond the principal purpose of the at-will employment doctrine: to authorize an employer to *dismiss* an employee without cause. By contrast, federal and state employment discrimination laws apply to the terms and conditions of the entire employment relationship, including hiring, pay, and benefits, as well as dismissal. Although petitioner claims that it is free to fire all of its bank officers in violation of any state employment discrimination law, it does not (and cannot) argue that, under the at-pleasure provision, it may refuse to *hire* bank officers in violation of those laws. Our point here is not to unveil an inconsistency in petitioner's position, but to demonstrate that a provision aimed at assuring that national banks may *dismiss* their officers without cause cannot sensibly be read to negate a state statute aimed not at imposing a for-cause regime, but at prohibiting one kind of employer misconduct —*discrimination*—in all aspects of the employment relationship.

2. Petitioner's characterization of state anti-discrimination law as anathema to the National Bank Act's interest in the uniformity of federal law fundamentally misconceives the interaction of the ADEA and its state-law counterparts. As the court of appeals explained, *see* Pet. App. 22a, far from being independent of, or at odds with, state law, the ADEA relies on state law as the front-line enforcement mechanism for achieving its basic anti-discrimination purpose. *See* 29 U.S.C. §§ 633, 626. Petitioner seeks to avoid the import of these provisions by

characterizing them as mere procedures that an ADEA claimant must employ before turning to federal procedures. Pet. 17-18 n.2. But examination of the ADEA provisions demonstrate significant deference to state *substantive* law. First, 29 U.S.C. § 633(a)—which provides that "[n]othing in this chapter shall affect the jurisdiction of any agency of any State performing like functions with regard to discriminatory employment practices"—is best understood as an *anti*-preemption provision. It effectively allows an employment discrimination claimant to employ state processes to vindicate her rights under state substantive law, even though the ADEA creates a federal right of action based on federal substantive law. *Cf. California Fed. Sav. & Loan Ass'n v. Guerra*, 479 U.S. 272 (1987); *id.* at 295-96 (Scalia, J., concurring in the judgment).

Moreover, the ADEA not only *permits*, but *requires*, a claimant to seek relief under applicable state law. Under 29 U.S.C. § 633(b), when state procedures are available, an age discrimination claimant must use those procedures to seek relief *under that state's age discrimination law* before filing suit under federal law. *See Oscar Mayer & Co. v. Evans*, 441 U.S. 750, 754-58 (1979); 29 U.S.C. § 633(b) (referring to proceedings "commenced under the state law."). And in such situations, the ADEA extends the period for filing a federal claim with the EEOC, *id.* § 626(d), to provide the claimant with a meaningful opportunity to obtain relief under *state law* before having to decide whether to seek a federal remedy. *See Oscar Meyer*, 441 U.S. at 756 (the ADEA's state deferral procedures are "intended to screen from the federal courts those discrimination complaints that might be settled to the satisfaction of the grievant in state proceedings."). The ADEA thus incorporates and embraces state substantive age discrimination law. That being the case, a holding that the National Bank Act's at-pleasure provision overrides the WLAD would effectively negate the specific scheme for eradicating workplace discrimination adopted by Congress in the

ADEA—a law that petitioner acknowledges protects national bank officers from age-based dismissal.

3. The court of appeals held that Ms. Kroske's WLAD claim may go forward because it substantively mirrors a claim available under the ADEA. Petitioner asserts that lower courts will have difficulty deciding what "may or may not" be "substantive." Pet. 20. At best, that assertion is speculative and provides no basis for review now, before the lower courts have encountered any such difficulty.

But the ruling below will not be difficult to apply. The question under the court of appeals' decision is whether the state law's substantive standard for determining discrimination mirrors that of the ADEA. *Cf. Medtronic, Inc. v. Lohr*, 518 U.S. 470, 495-97 (1996) (federal-law duties do not preempt equal or substantially identical state-law duties, even if state law provides a remedy unavailable under federal law); *Bates v. Dow Agrosciences LLC*, 544 U.S. 431, 447-49 (2005) (same). Petitioner does not challenge the identity between the WLAD and the ADEA in that regard; rather, it complains that Ms. Kroske is seeking compensatory damages of a kind assertedly unavailable under the ADEA. *See* Pet. 20. At this juncture, because this case is in its infancy, *see supra* Part B, it is impossible to know whether Ms. Kroske will be found entitled to state-law relief that differs from the full range of make-whole relief available under the ADEA such as back pay and benefits, reinstatement or front pay, and liquidated damages. *See* 29 U.S.C. §§ 626(b), (c); *see also Rice v. Norman Williams Co.*, 458 U.S. 654, 659 (1982) (hypothetical or potential conflicts are insufficient to warrant preemption of state law).

More importantly, the form of relief to which Ms. Kroske may be entitled does not alter the fact that the substantive liability standard under the WLAD mirrors that of the ADEA. Pet. App. 21a. If, as petitioner proclaims, uniformity is what matters, petitioner should be concerned with whether

differences between state and federal law make it difficult for national banks to conform their primary conduct to a federal anti-discrimination norm that prohibits banks from dismissing officers on account of their age. There is no reason to believe that national banks' treatment of their older employees will depend on whether they are potentially liable for the extensive relief available under the ADEA or, in some states, other types of monetary relief.[5]

4. The court of appeals correctly noted that a state-law discrimination claim presumptively withstands an assertion of federal preemption because, when enacted pursuant to a state's

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[5]Two other areas of potential state-law variation cited by petitioner are irrelevant in the context of this case. Petitioner notes that although the ADEA applies only to employers with 20 or more employees, some states have a lower threshold. Pet. 21. But the at-pleasure provision here involves only one kind of employer—a national bank—and it is very unlikely that there are any national banks with fewer than 20 employees. (Petitioner is one of the principal subsidiaries of U.S. Bancorp, which, as of the end of 2005, had just under 50,000 employees. U.S. Bancorp 2005 Annual Report and Form 10-K, p. 11, available at http://www.sec.gov/Archives/edgar/data/36104/000095013406004429/c01303e10vk.htm.) Similarly, petitioner observes that some state age discrimination statutes protect workers younger than 40, which is the minimum age for protection under the ADEA. *See* Pet. 20-21. But the minimum age is also 40 under the WLAD. Wash. Rev. Code §§ 49.44.090(1), 49.60.205. Moreover, Ms. Kroske was 51 when she was fired. *See* Pet. App. 4a. Thus, her case is not an appropriate vehicle for deciding whether the National Bank Act's at-pleasure provision authorizes national banks to fire officers under 40 on account of their age even where state law prohibits such firings.

Petitioner also claims that the decision below "creates confusion as to what to do" about differences among the administrative procedures that accompany the states' anti-discrimination laws. Pet. 21. As explained earlier (at 16-18), the ADEA specifically incorporates those procedures. *See* 29 U.S.C. §§ 633, 626(d). Therefore, those procedures, whether or not uniform, are no basis for holding state substantive law preempted. In any event, differences among administrative procedures will not affect the primary conduct of a national bank because they have nothing to do with the standard for dismissal of a national bank officer.

historic police powers, state law is ousted only when preemption is the "clear and manifest purpose of Congress." Pet. App. 9a (citing cases); *see DeCanas v. Bica*, 424 U.S. 351, 356 (1976) ("States possess broad authority under their police powers to regulate the employment relationship to protect workers within the State."). Petitioner claims that this presumption against preemption does not apply when the state regulates in an area historically occupied by the federal government. Pet. 25-27; *see United States v. Locke*, 529 U.S. 89, 108 (2000). That truism does not apply here because the National Bank Act does not occupy the relevant field. Petitioner appears to take the position that if the National Bank Act displaces all state authority in core areas of bank regulation—a point that need not be addressed in this case—Congress must have also done so with respect to all other activities of national banks. But such an assumption is contrary to the reality of regulation under the National Bank Act, which, for instance, has never entered the field of employment discrimination. *See* Pet. App. 11a (citing examples of state bank regulations that are preempted and those that are not).

Petitioner's position is also inconsistent with this Court's preemption jurisprudence, which treads lightly on the state's traditional regulatory prerogatives. *See, e.g., Medtronic*, 518 U.S. at 485. The Court has held, therefore, that even where an Act of Congress preempts certain state laws that directly conflict with that Act's basic purposes, related state law may be unaffected. For instance, in *Buckman Co. v. Plaintiffs' Legal Comm.*, 531 U.S. 341 (2001), the Court held preempted a state-law damages claim that a medical device's approval under the Food, Drug, and Cosmetic Act was procured by fraud on the Food and Drug Administration. Because "[p]olicing fraud against federal agencies" is not a function historically performed by the states, *id.* at 347, the presumption against preemption did not apply. In the same breath, however, the Court contrasted the fraud-on-the-agency claim with a

traditional state-law damages claim for a manufacturer's defective design and manufacture of a medical device approved under the very same Act, because of "federalism concerns and the historic primacy of state regulation of matters of health and safety[.]" *Id.* at 348 (quoting *Medtronic*, 518 U.S. at 485).[6]

Similarly, the National Bank Act does not sweep away all state law that might touch on the operation of national banks. As early as 1869, the Court had concluded that the national banks were "subject to the laws of the State, and are governed in their daily course of business far more by the laws of the State than of the nation." *First Nat'l Bank v. Commonwealth of Kentucky*, 76 U.S. 353, 362 (1869). As the Court has recently explained, states may regulate national banks when "doing so does not prevent or significantly interfere with the national bank's exercise of its powers." *Barnett Bank of Marion County, N.A. v. Nelson*, 517 U.S. 25, 33 (1996). Measured against either the general purposes of the National Bank Act or the specific purpose of its at-pleasure provision, Ms. Kroske's WLAD claim would not significantly interfere with petitioner's bank powers.

Commentators have identified Congress's three general

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[6]The petition's effort to transform the court of appeals' brief statement regarding the presumption against preemption into a second question presented is unavailing. The petition's reliance (at 26-27) on recent appellate decisions regarding the presumption against preemption under the National Bank Act, one of which this Court has agreed to review, *see Watters v. Wachovia Bank, N.A.*, No. 05-1342 (cert. granted June 19, 2006), is off the mark. Those cases concern states' efforts to regulate the mortgage lending activities of national bank subsidiaries and have nothing to do with whether the presumption against preemption applies to the states' traditional role in regulating employment relations. Contrary to the petition's assertion (at 26), the court of appeals explicitly acknowledged that the presumption against preemption does not apply when state law seeks to invade an arena of exclusive and longstanding federal control, *see* Pet. App. 9a, but recognized that policing employment discrimination is not such an arena. *See id.* at 8a-9a.

objectives in enacting the National Bank Act: (1) to develop a national currency; (2) to create markets for federal bonds to finance the Civil War and (3) to use the national banks as depositories of government funds. *See* Edward L. Symons, Jr. *The 'Business of Banking' in Historical Perspective*, 51 Geo. Wash. L. Rev. 676, 699 (1983); Geoffrey P. Miller, *The Future of the Dual Banking System*, 53 Brook. L. Rev. 1,13 (1983). State anti-discrimination legislation conflicts with none of these objectives.

Specifically, the at-pleasure provision was intended to permit a national bank to remove an officer who had lost the public's trust and whose conduct undermined the bank's financial integrity. *See, e.g., Wells Fargo Bank N.A. v. Superior Court,* 811 P.2d 1025, 1029 (Cal. 1991) (quoting *Westervelt v. Mohrenstecher*, 76 F. 118, 122 (8th Cir. 1896)) (Congress included the at-pleasure provision to protect "the safety and prosperity of banking institutions" and to avoid public concern surrounding those "officers, to whose integrity and discretion the moneys and property of the bank and its customers are intrusted"); Pet. App. 13a-14a ("original congressional intent behind the at-pleasure provision of the Bank Acts was to ensure the financial stability of the banking institutions by affording them the means to discharge employees who were felt to compromise an institution's integrity") (quoting Sharon A. Kahn & Brian McCarthy, *At-Will Employment in the Banking Industry: Ripe for a Change*, 17 Hofstra Lab. & Emp. L.J. 195, 215 (1999)); *see generally Westervelt*, 76 F. at 122.

Nothing in state anti-discrimination law—which permits an employer to dismiss an employee for any reason other than a discriminatory reason—conflicts with these purposes. Indeed, the public trust in our national banks is undermined, not promoted, by a rule that gives the banks authority to discharge officers on the basis of the officers' race, color, national origin, age, sex, or religion. For that reason as well, the Court should deny review and allow Ms. Kroske's case to proceed on its

merits.

CONCLUSION

The petition for a writ of certiorari should be denied.

Respectfully submitted,

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